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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No. 27

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE PACIFIC LINES OF SOUTHERN PACIFIC COMPANY (an unincorporated association),

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY and GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN (an unincorporated association),

Respondents.

BRIEF FOR PETITIONER.

GEORGE M. NAGLE,
Alexander Building, San Francisco, California,
Attorney for Petitioner.

CLARENCE E. WEISELL,
(Horn, Weisell, McLaughlin & Eybarger),
Engineers Building, Cleveland, Ohio,

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OPINION BELOW.

The opinion of the Court below (R. 792) is reported in 132 F. (2d) 194. There was no opinion in the District Court (Northern District of California).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered November 13, 1942. (R. 791.) A petition for rehearing was seasonably made and entertained, and denied, with modification of opinion, on January 22, 1943. (R. 828-829.) The petition for certiorari was filed March 22, 1943, and granted on May 24, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 USC § 347.)

STATUTES INVOLVED.

Because they are long the relevant portions of statutes are set out in Appendix A. They are:

1. The Railway Labor Act of May 20, 1926, as amended June 21, 1934, c. 691, 48 Stat. 1185 (45 USC §§ 151-163).

2. The Clayton Act, § 20, of October 15, 1941, c. 323, 38 Stat. 738 (29 USC § 52).

3. The Norris-LaGuardia Act of March 23, 1932, c. 90, 47 Stat. 70 (29 USC §§ 101-115).

4. The Declaratory Judgments Act of June 14, 1934, c. 512, 48 Stat. 955, adding section 274d to the Judicial Code (28 USC § 440).

STATEMENT.

Respondent Southern Pacific Company is a "carrier" within the meaning of § 1, First, of the Railway Labor Act. (Findings 1 and 2, R. 44.)

The locomotive engineers in the carrier's employ comprise a separate "craft or class of employes" (Finding 4, R. 45) as that phrase is used in the Act, including its use in § 2, Fourth, viz.:

> "The majority of any craft or class of employes shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

For many years before the passage of the Act and ever since petitioner General Committee of Adjustment (hereinafter called "Engineers' Brotherhood") has been the representative designated by the majority of the craft or class of locomotive engineers, and has collectively negotiated and entered into, with the carrier, agreements (hereinafter called "Engineers' Schedule") concerning rates of pay, rules and working conditions of the craft. (Findings 4 and 5, R. 45, and 46; Engineers' Schedule printed at R. 326-467, offered in evidence at R. 111.) Similarly, in respect to the separate craft of locomotive firemen, respondent General Grievance Committee (hereinafter called "Firemen's Brotherhood") is the majority representative thereof, and has concurrently had a collective agreement, hereinafter called "Firemen's Schedule". (Findings 4 and 5, R. 45, 46 and 47; Firemen's Schedule printed at R. 468-636, offered in evidence at R. 111.)

The memberships of the two brotherhoods overlap; most of the locomotive engineers are members of one Brotherhood or the other, some are members of both, and a few of neither (Finding 3, R. 45); i.e., Firemen's Brotherhood has in its membership a minority of the craft or class of locomotive engineers.

The last Firemen's Schedule collectively entered into by the craft of *firemen* with the carrier (R. 468-6636), printed and published June 1, 1939, was the first Firemen's Schedule printed and published by Firemen's Brotherhood subsequent to the decision by this Court on March 29, 1937, of *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515. It contained the following Article (R. 6; Finding 5, R. 46-47; R. 468 at 616):

"Article 51

"Adjustment of Differences

"Sec. 1. The right of any **engineer**, fireman, hostler or hostler helper to have the regularly constituted committee of his organization represent him in the handling of his grievances, in accordance with the laws of his organization and under the recognized interpretation of the General Committee making the schedule, involved, is conceded. * * *."

The inclusion of the word "engineer" therein was the subject of protest by Engineers' Brotherhood to the carrier (R. 177-178), and the subject of controversy between the two Brotherhoods. (R. 208.) There was an actual controversy between petitioner Engineers' Brotherhood, on one side, and the carrier and Firemen's Brotherhood, on the other, as to the validity of that inclusion in Article 51, section 1, quoted supra (Finding 17, R. 54-55), forming the basis of the Engineers' complaint for declaratory relief (R. 2-13), praying a declaration of rights and legal relations and further relief. (R. 13.)

The history of the inclusion of the word "engineer" in Article 51, section 1, of the Firemen's Schedule is this: In the year 1913 the two Brotherhoods entered into an

agreement known as the Chicago Joint Agreement, which was received in evidence at R. 199-200 as Exhibits 9a, 9b and 9c, and appears in full as follows:

(R. 669-683): "Chicago Joint Agreement Between the Brotherhood of Locomotive Engineers and Brotherhood of Firemen, May 17, 1913."

(R. 684-700, do.): "Revised at Cleveland, May 4, 1918."

(R. 701-725, do.): "Revised at Cleveland, May 1, 1923."

No carrier was a party[1] to the Chicago Joint Agreement. It was in the nature of a treaty between the two craft organizations. Article 9 reads:

> "The principle of joint schedules[2] for engineers, firemen and hostlers is affirmed and it is the recommendation of this Committee that joint meetings of the General Committees on every system of railroad be arranged for in future schedule negotiations. The policy of joint action herein subscribed to shall also apply to concerted wage movements." [R. 673, 689, 706.]

On the Southern Pacific, however, there was never a joint agreement between the carrier and the respective representatives of the two crafts (R. 264); the Chicago

[1] Emergency Boards appointed by the President under § 10 of the Railway Labor Act sometimes go wrong on questions of law, but should not go wrong on questions of fact; but one appointed in the course of this controversy mistakenly stated that the Carrier (i.e., Southern Pacific Company) was a party to the Chicago Joint Agreement. R. 739, marginal note. Neither Southern Pacific, nor any other carrier, ever was a party to the Chicago Joint Agreement.

[2] In railroad parlance, an agreement entered into by the carrier with the representative of a craft is called a "schedule." Sections of a schedule are often called "rules."

Joint Agreement was never adopted in its entirety on the Southern Pacific (R. 301); some of the provisions were carried into the separate agreements with the two crafts. (R. 200.) One of such provisions was Article 7[3] of the Chicago Joint Agreement, which read in part as follows:

> "(a) The right of any engineer, fireman or hostler to have the regularly constituted committee of his organization represent him in the handling of his grievances, in accordance with the laws of his organization and under the recognized interpretation of the General Committee making the schedule, involved, is conceded. * * *"
>
> "(d) When a member of either organization has a grievance which the local committee of his organization is unable to adjust with the local officers of the company, the matter shall be referred to the two General Chairmen who shall unite and work jointly in handling such grievance to its final conclusion. * * *" [R. 671-672.]

The representation rule in the Firemen's Agreement, Article 51, section 1, "came out of the Chicago Joint Agreement". (R. 165-166; cf. 660-663.) The provisions relating to representation of engineers (Engineers' Agreement, Art. 32, sec. 22, and Firemen's Agreement, Art. 51, sec. 1), are traced chronologically through previous agreements and arranged in parallel in Exhibit 8. (R. 660-663, and 188.) Therefrom it will be seen that the first appearance of the representation rule in the Firemen's Agreement was in the one effective May 11, 1915, and subsequently republished in successive agreements in 1918, 1919,

[3] To be read, of course, with Article 9, R. 673, laying down "the principle of joint schedules", along with the agreement as a whole, which was a Joint Agreement.

[4] So in the Revisions of 1918 and 1923. R. 687, 704.

1922, 1924 and 1929. Article 15[5] of the Chicago Joint Agreement read:

> "This agreement shall not be amended, revised or annulled, until after thirty days written notice has been served by order of the Convention of either organization." [R. 681, 699, 722.]

In accordance therewith, Engineers' Brotherhood (R. 201), terminated the Chicago Joint Agreement effective in October, 1927. (R. 201, 176, 157.) Disputes have since developed as a result. (R. 201.)

The amendments of June 21, 1934, to the Railway Labor Act of May 20, 1926, enacted "majority rule", § 2, Fourth, and the exclusive[6] right of the representative designated by the majority of a craft was first sustained by this Court on March 29, 1937. Exhibit 2, Firemen's Agreement, published June 1, 1939, is the first[7] Firemen's

[5] Article 16 in the 1923 Revision.

[6] *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 548, 81 L. Ed. 789, 800: "It imposes the affirmative duty to treat only with the true representative and hence the negative duty to treat with no other."

[7] The dates since 1903 of successive printing of agreements between the carrier and the Firemen may be collected from the chronology in Exhibit 7, R. 637-659 beginning April 1, 1907, as follows:

R. 637, April 1, 1907;
R. 638, May 16, 1910;
R. 642, May 11, 1915;
R. 645, December 1, 1918;
R. 647, January 1, 1919;
R. 648, May 1, 1929;
R. 653, June 1, 1939.

Similarly as to the Engineers' Agreement:

R. 637, January 1, 1903;
R. 638, March 1, 1908;
R. 639, February 20, 1911;
R. 645, October 1, 1918;
R. 647, January 1, 1919;
R. 648, December 1, 1919;
R. 653, January 9, 1931.

agreement published after March 29, 1937. The inclusion therein of the provisions complained about in this litigation was the subject of dispute by Engineers' Brotherhood with the carrier (R. 177), and the subject of dispute between the two Brotherhoods. (R. 208.) It was the subject of a strike ballot and of controversy before an Emergency Board appointed by the President under § 10 of the Railway Labor Act (R. 726, et seq.), in 1937, which controversy persisted through the filing of the complaint for declaratory relief (R. 2) in the case at bar on August 12, 1939. (R. 13.) The parties were acutely aware of the controversy, the complaint (R. 12, paragraph 10), alleged:

> "10. An actual controversy exists between plaintiff and defendant with respect to the rights and other legal relations of plaintiff in the premises. It is the assertion and contention of plaintiff that the provisions quoted from said Firemen's Agreement in paragraph 9, supra, as agreed between defendant and said Firemen's Committee, and the interpretation and application thereof, violate and interfere with the right and duty of plaintiff to act as the sole designated representative of said craft of engineers, with the right and duty of the plaintiff to make, maintain, and interpret agreements concerning rates of pay, rules and working conditions for said craft of engineers, and with the rights of said craft of engineers, under and for the purposes of said Railway Labor Act and the aforementioned Engineers' Agreement by and between plaintiff and defendant; and that by said Firemen's Agreement defendant has bargained collectively with said Firemen's Committee with respect to rules and working conditions governing, affecting and concerning said craft of engineers in their service as locomotive engineers. They do so violate and interfere. Defendant contends that they do not."

The answer of defendant carrier (R. 14, paragraph 7), said (R. 22):

> "7. Answering paragraph 10 of said complaint, defendant admits that plaintiff makes the assertions and contentions therein set forth, but denies that the same are well founded in either law or fact; defendant denies, in particular, the allegations set forth in the sentence appearing in lines 5 and 6 on page 10 of said complaint, and reading 'they do so, violate and interfere'. Defendant admits that an actual controversy exists between plaintiff and defendant, as alleged in said paragraph 10."

And the intervening Firemen in paragraph VII of their pleading said (R. 27):

> "VII. Answering paragraph 10 of the complaint, intervener admits that plaintiff makes the assertions and contentions therein stated, and admits that an actual controversy exists between plaintiff and defendant, but denies that any of the said assertions and contentions of plaintiff is well founded, and denies that any provision of said Firemen's agreement violates or interferes with any right of plaintiff or any of plaintiff's members, or any right of the craft of engineers, or is in any way contrary to the Railway Labor Act."

The controversy was over the "rights and legal relations" of the parties, upon questions of law. See the opening statements: for plaintiff-appellant (R. 73-83); for defendant-appellee (R. 83-90); for intervener-appellee (R. 90-103). Therein Mr. Burton Mason, for defendant, stated:

> "From an inspection of the pleadings in this case, it becomes apparent at once that there are practically

no contested issues of fact. The only matter as to which the pleadings reveal any dispute of fact relates to the number of locomotive engineers in the employ of the defendant railroad company; and the parties have agreed to accept the figures prepared from the company's records, and presented here by a witness for the company, as correct upon that issue. The essential issues are therefore purely legal issues, arising from undisputed facts." [R. 83.]

Mr. Donald R. Richberg, for intervener, said:

"Now, there is no real issue as to any vital facts in this case. I think your Honor will have observed from the statement of Counsel for the Plaintiff and Counsel for the Defendant Railroad an agreement upon that point. Although there are certain denials in the answer of the Railroad and in the answer of the Intervener, they concern either denials of allegations that are essentially conclusions or declarations of right or denials of fact that are not material to the final determination of the issues here. Your Honor is presented with practically pure issues of law, not encumbered with any real vital issues of fact, and for that reason I think perhaps a proper part of a statement at this time should be to endeavor to make clear just what those issues of law are. I may say that testimony is of use in this case only perhaps for these purposes. It may help to make clear the meaning of the allegations of the complaint to have testimony showing the practical operating conditions on the railway that produced this particular dispute." [R. 90-91.]

The Court below affirmed a declaration and decree (R. 55-57) of the District Court that the inclusion of the

word "engineer" in Article 51, section 1, supra, in the Firemen's Schedule is valid.

Subsidiary thereto, the Court below affirmed a companion declaration and decree (Conclusion 2, R. 55; Decree 5, R. 56) that Firemen's Brotherhood (although designated by only a minority of the craft of engineers) "is not precluded by the Railway Labor Act, or otherwise" from handling individual grievance claims "arising out of any engine employment, including employment as an engineer", i.e., grievance claims arising and asserted under the Engineers' Schedule.

For the convenience of the Court we here reprint those portions of the findings (R. 44, et seq.), that bear on the questions presented by the petition for certiorari:

The findings. (R. 44, et seq.)

1. Defendant is and at all times herein mentioned was a common carrier by railroad, engaged in the transportation of passengers and property in, through and between the states of Oregon, California, Arizona, New Mexico, Texas, Nevada and Utah.

2. Part of defendant's line is and was at all said times a separate operating unit called "Pacific Lines", with termini at Portland, Oregon, and San Francisco, California, Ogden, Utah, and El Paso, Texas.

3. At all times herein mentioned plaintiff was and is now a voluntary unincorporated labor association organ-

General Committee of Adjustment, Pacific Lines of the carrier has 14 seniority districts. On each of 8 of them the Engineers' Brotherhood has one local committee; 3 of the districts have 2 local committees each. The membership of plaintiff General Committee consists of the 14 local chairmen. (R. 135.)

ized under the authority of the Grand International Brotherhood of Locomotive Engineers (hereinafter called the Engineers' Brotherhood); intervener was and is now a voluntary unincorporated labor association organized under the authority of The Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the Firemen's Brotherhood); both said brotherhoods were and are now likewise voluntary unincorporated labor associations, members of which are and at all said times have been employed as locomotive firemen and engineers on the railroads of the United States and Canada, including said Pacific Lines. Said brotherhoods have, respectively, total memberships of approximately 60,000 (engineers) and 85,000 (firemen). The memberships of the brotherhoods overlap: most enginemen belong to one or the other; some belong to both, and a few to neither.

4(a). There are and continuously for many years have been a craft or class of locomotive engineers and a craft or class of locomotive firemen in the service of defendant on said Pacific Lines, which crafts or classes ever since the enactment of the Railway Labor Act have been and are now recognized by defendant as crafts or classes of employees of defendant within the meaning of said Act. Plaintiff is and ever since the enactment of the Railway Labor Act has been the representative, for purposes of collective bargaining and agreement, selected by a majority of the class or craft of locomotive engineers on Pacific Lines. Intervener is and ever since the enactment of said Act has been the representative, for purposes of collective bargaining and agreement, selected by a majority of the class or craft of locomotive firemen on said Pacific Lines.

(b) The craft of engineers is, generally speaking and as a group, the higher paid and older in point of service of said two crafts. Individuals in both crafts are paid for service on the basis of hours served or miles run, either actual or constructive, or a combination of both hours and miles, whichever results in the greater payment. Such wage payments are made pursuant to and are governed by specific provisions of the agreements referred to in paragraph 5 hereof.

5. For many years before the passage of said Act and ever since, agreements have been negotiated from time to time between plaintiff and defendant and between defendant and intervener concerning rates of pay, rules, and working conditions of said crafts of engineers and firemen. The last of said agreements between plaintiff and defendant was made in writing, effective January 9, 1931, and has been continuously in effect ever since, with occasional amendments and additions; said agreement is hereinafter called the Engineers' Agreement. The last of said agreements between defendant and intervener was made in writing, effective as to rates of pay October 1, 1937, and as to rules June 1, 1939 and has been continuously in effect ever since; with occasional amendments and additions; said agreement is hereinafter called the Firemen's Agreement.

6. (a) In locomotive employment, there are and continuously for many years have been constant changes in the duties and status of the engine employees and a constant ebb and flow between the craft of engineers and firemen. The number of engineers in defendant's service varies and has varied continuously with fluctuations in

volume of traffic, seasonal and otherwise, and the number of firemen in defendant's service varies and has varied continuously for the same reasons. When the volume of defendant's business increases, furloughed engineers and qualified firemen are called to service as engineers. When traffic declines, engineers are demoted and almost all of them displace firemen; firemen so displaced in turn displace other firemen, their juniors on the firemen's seniority list and firemen with the least seniority are released from work.

(b) When additional locomotive engineers are required on Pacific Lines, they are largely obtained from the ranks of qualified firemen, and such firemen are generally advanced to service as engineers in the order of their seniority as firemen. Firemen are required to qualify for service as engineers and to accept promotion when an opening occurs.

(c) As of January 1, 1940, there were 2343 employees of defendant on the seniority list of engineers for Pacific Lines, of whom 1654 were actually employed as engineers and 497 were actually employed as firemen. On that day approximately one-fifth of the firemen employed had been demoted from the engineers' working list, and at the time of their demotion had displaced firemen their juniors. As of July 1, 1940, there were 2307 employees of defendant on the seniority list of engineers for Pacific Lines, of whom 1736 were actually employed as engineers and 326 were actually employed as firemen. On that day approximately one-seventh of the firemen employed had been demoted from the engineers' working list and at the time of their demotion had displaced firemen their juniors.

7. (a) In the operation of Pacific Lines, there arise individual claims and grievance cases, involving disputes between individual employees and defendant as to their respective rights under the agreements referred to in paragraph 5 and as to matters not covered by said agreements. It is and ever since long prior to the enactment of the Railway Labor Act has been the custom for an engineman who has an individual claim arising out of any such dispute, and who desires the Firemen's or Engineers' Brotherhood (or other representative) to represent him in presenting and handling to conclusion the claim against defendant, to select whichever brotherhood (or other representative) he desires. In such cases a claimant engineman is not and never has been required to choose as his representative the brotherhood or labor organization selected as a representative for collective bargaining by the majority of employees in the service in which the claimant was employed when the dispute arose.

(b) The usual manner of handling such individual claims is and since long prior to the enactment of the Railway Labor Act continuously has been for the claimant to select as his representative the brotherhood of which he is a member, regardless of the craft or class in which he was employed when the dispute arose. In a limited number of cases, the claimant presents or has presented his claim to defendant directly and without representation, or he selects or has selected another organization or individual to represent him. Such presentation and handling to conclusion of a claim by the individual directly concerned, or a representative other than the brotherhood to which claimant belongs, is within

the scope and meaning of the "usual manner of handling". When a claim, after initial presentation to defendant, is handled further with defendant's officers, or subsequently presented to the National Railroad Adjustment Board, it is usually handled by the same brotherhood (or other representative selected by the claimant) as presented the claim to defendant.

(c) On almost every railroad in the United States, all individual claims, grievances and disputes of enginemen against their employers, whether within the scope of a collective bargaining agreement or not, and whether involving rights arising from such agreement or not, are and from a date long prior to the passage of the Railway Labor Act have been handled in the manner hereinabove set forth as applicable to defendant's Pacific Lines, and such was at all said times and is now the usual manner of handling such claims.

8. At all times herein mentioned the Engineers' Brotherhood and Firemen's Brotherhood have been and now are in competition for members. If members of the Firemen's Brotherhood were required to present their individual claims and grievances arising from service as engineers through the Engineers' Brotherhood, that fact would discourage membership in the Firemen's Brotherhood and encourage membership in the Engineers' Brotherhood. The presentation of such claims and grievances through the Firemen's Brotherhood, or other representative chosen by the individual claimant, does not affect or alter the Engineers' Agreement referred to in paragraph 5 or other collective bargaining agreement, or infringe any right of plaintiff as representative of the craft or class of engineers.

9. Section 1 of Article 51 of said Firemen's Agreement (which provides for the right of individual representation in claim and grievance cases) was based upon a similar provision in the agreement between defendant and intervener, dated May 1, 1929, which was based upon a practically identical provision in subsection (a) of Article VII of the agreement called "Chicago Joint Agreement", dated May 17, 1913, between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. A substantially similar provision has since appeared in all contracts of each brotherhood, or the agencies thereof, with defendant. Neither plaintiff nor the Engineers' Brotherhood protested the inclusion of such provisions in any agreement between defendant and intervener until early in the year 1939.

10, 11, 12, 13, 14. * * *

15. At and before and at all times since the enactment of the Railway Labor Act in 1926, the custom on most railroads of the United States has been and is now for the employer to bargain collectively with its employees by crafts; the custom on said railroads was at all said times and is now that such class or craft representative be the organization chosen by the majority of the employees in said craft.

16. * * *

17. There is an actual controversy between plaintiff and defendant and between plaintiff and intervener as to matters set forth in the pleadings of the parties and intervener, including controversy as to the validity of Article 51, section 1 * * *.

The conclusions of law. (R. 55.)

1. This action involves laws regulating interstate commerce; this Court has jurisdiction, and the case is a proper one for the declaration, as herein set forth, of the rights and other legal relations of the parties.

2. The Firemen's Brotherhood (including its agencies, including intervener) is not precluded by the Railway Labor Act, or otherwise, from representing, and it has the lawful right to represent, its own members and any other individuals who desire its services in presenting any type or class of individual claim or grievance against defendant arising out of any engine employment, including employment as engineer, and the Firemen's Brotherhood (including its said agencies) has the lawful right to handle such claims and grievances to a conclusion, and the Engineers' Brotherhood does not have the sole or any right of representation in any such cases against the will of the individual claimant.

3, 4. * * *

5. Defendant and intervener are entitled to judgment that:

(a) Intervener has the lawful right to represent members of the Firemen's Brotherhood and any other individuals who desire its services, in presenting any type or class of individual claims or grievances against defendant arising out of engine employment, including employment as engineer, and intervener has the lawful right to handle such claims and grievances to a conclusion, and plaintiff does not have the sole or any right of representation in any such cases against the will of the individual claimant.

(b) Article 51, section 1 [and * * *], of the Firemen's Agreement, are, and each and every part of each and every one of them is, valid, and they do not nor does any of them violate either the Railway Labor Act or any other law or infringe any right of the Engineers' Brotherhood or of plaintiff.

(c) Defendant and intervener recover their costs from plaintiff.

Let judgment be entered accordingly.

The decree. (R. 58.)

This cause came on to be heard at this term and was argued by counsel, and upon consideration thereof, it was ordered, adjudged and decreed as follows:

a. Intervenor has the lawful right to represent members of the Brotherhood of Locomotive Firemen and Enginemen, and any other individuals who desire its services, in presenting any type or class of individual claims or grievances against defendant arising out of engine employment, including employment as engineer, and intervener has the lawful right to handle such claims and grievances to a conclusion, and plaintiff does not have the sole, or any, right of representation in any such cases against the will of the individual claimant.

b. The following provisions in that certain contract, called "Firemen's Agreement", between defendant and Brotherhood of Locomotive Firemen and Enginemen, effective as to rates of pay, October 1, 1937, and as to rules, June 1, 1939, namely,

Article 51, section 1: * * *;

are, and each and every part of each and every one of them is, valid, and they do not, nor does any of them, violate the Railway Labor Act, or any other law, or infringe any right of plaintiff.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred (in that branch of the decision under the Court's heading "A", R. 793 to 815):

(1) In holding that the inclusion of the word "engineer" in Article 51, section 1, of the Firemen's Schedule does not violate the exclusive right of petitioner Engineers' Brotherhood to represent the craft or class of locomotive engineers, as the representative designated by the majority of that craft or class under the Railway Labor Act.

(2) In holding that an individual member of the craft who elects to prosecute an individual grievance claim under the adjustment machinery of the Railway Labor Act, through a representative, may do so through a representative not designated by the majority of the craft.

QUESTIONS PRESENTED.

The questions presented on the merits in our petition for certiorari are:

1. Is the inclusion of the word "engineer" in Article 51, section 1, of the Firemen's Schedule a violation of the exclusive right of petitioner Engineers' Brotherhood

to represent the craft or class of locomotive engineers as the representative designated by the majority of that craft or class under the Railway Labor Act?

2. Has any representative other than petitioner Engineers' Brotherhood, designated by the majority of the craft, a right to present and represent grievance claims under the Act in the case of any individual member of the craft of locomotive engineers who desires to proceed through a representative in presenting and prosecuting a grievance claim under the adjustment machinery of the Act?

REQUESTED DISCUSSION.

In the order granting certiorari, R. 831, the Court requested counsel to discuss in their briefs the following questions:

(1) whether resort to the declaratory judgment procedure is appropriate in the circumstances;

(2) whether any questions of the construction of the contracts involved are governed by state or by federal law;

(3) what bearing, if any, the Norris-LaGuardia Act has on the propriety of granting the relief sought.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE INCLUSION OF THE WORD "ENGINEER" IN ARTICLE 51, SECTION 1, OF THE FIREMEN'S SCHEDULE DOES NOT VIOLATE THE EXCLUSIVE RIGHT OF PETITIONER ENGINEERS' BROTHERHOOD TO REPRESENT THE CRAFT OR CLASS OF LOCOMOTIVE ENGINEERS, AS THE REPRESENTATIVE DESIGNATED BY THE MAJORITY OF THAT CRAFT OR CLASS UNDER THE RAILWAY LABOR ACT.

The effect of the inclusion of the word "engineer" in the Firemen's Schedule, Article 51, section 1, "Adjustment of Differences", is that the carrier and a minority brotherhood have collectively contracted with respect to the craft or class of locomotive engineers in violation of the exclusive right of petitioner, the representative designated by the majority of the craft. This Court held in the year 1937 in *Virginian Railway Co. v. System Federation*, 300 U. S. 515, 548, that the provisions of the Railway Labor Act giving to the employees the right to organize and bargain collectively through the representative of their own selection gave an exclusive right to the majority of the craft, and imposed the affirmative duty upon the carrier to treat only with the true representative of the craft and hence the negative duty to treat with no other. It appears that the Court below turned decision upon a misconception of the ruling of this Court in the *Virginian Railway Co.* case concerning the matter of individual hirings. The decree in the *Virginian Railway* case as construed by this Court was said not to preclude "such individual contracts as [the carrier] may elect to make directly with individual employees". (300 U. S., at 549.) In the *Virginian Railway* case no collec-

tive contract had been entered into with the true representative designated by the majority of the craft. When a collective contract has been made with the representative designated by the majority of a craft, it necessarily supplants or supersedes individual contracts theretofore made. The *exclusive* right of the craft representative designated by the majority of the craft has been made by the Congress, under the enactment of majority rule in the Railway Labor Act as amended in 1934, *paramount* to the individual "freedom of contract" theretofore existing. Under the Wagner Act of 1935, which borrowed majority rule from the Railway Labor Act of 1934, the following ruling was recently made by the Seventh Circuit Court of Appeals, speaking through District Judge Lindley:

> "Thus our rather narrow question is whether existing individual agreements with employees must yield to and be subordinated to the duty of the employer to bargain collectively with the Union as the exclusive agency, designated by law.
>
> More specifically respondent insists that, under the language of N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45, 108 A.L.R. 1352, the duty of the employer to bargain collectively with the designated agency does not preclude 'such individual contracts as the company may elect to make directly with individual employees' and asserts further authority for its position in the language of this court in N.L.R.B. v. Bear Brand Hosiery Co., 7 Cir., 131 F. 2d 731. However, we believe that other decisions of the Supreme Court remove any uncertainty as to the full scope of the statutory duty of the employer to bargain collectively with the selected agency and as to

the relationship of individual contracts with such duty, and establish the rule that inasmuch as the Act was expressly intended to promote and enacted under the constitutional congressional right to protect commerce, any existing contractual right interfering with effectuation of the legislative intent must yield to the duty imposed upon both employer and employees. Thus in National Licorice Co. v. N.L.R.B., 309 U. S. 350, at page 364, the court said: 'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. * * * Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting more than in a private litigation, that the employer's obedience to the Act cannot be compelled in the absence of the workers who have thus renounced their rights'.

It follows, we think, that the duty to bargain collectively is necessarily paramount to the freedom of contract enjoyed prior to enactment of the statute or before a collective agent has been chosen. When once the majority of the employees have exercised their right to choose a representative for bargaining, the employer's obligation to deal exclusively with such representative as to all terms and conditions of employment becomes unconditional irrespective of any individual bargain previously made. This is in accord with the rule announced in other decisions establishing the constitutionality of similar legislation. Contracts must be understood as having been made not only with reference to existing legislation but also with reference to the possible exercise of any rightful authority of the Government, and no

obligation of existing contracts may be invoked to defeat that authority. Knox v. Lee, 12 Wall. 457-549-551; Norman v. Baltimore & O. R. Co., 294 U. S. 240, 305-311, 95 A.L.R. 1352; United Shoe Machinery Corp. v. United States, 258 U. S. 451, 456; Paramount Famous Lasky Corp. v. United States, 282 U.S. 30; Interstate Cir., Inc., v. U.S., 306 U.S. 208. 'Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. * * * That [the power to restrict freedom of contract] may be exercised in the public interest with respect to contracts between employer and employee is undeniable. * * * the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere.'' West Coast Hotel v. Parrish, 300 U.S. 379, 391, 392, 394, 108 A.L.R. 1330.

Whether we look upon the power of the Congress to enact such legislation as the exercise of a police power growing out of the commerce clause, such as is the source of power of the State in regulation of its citizens' activities, State Public Utilities Comm. v. Quincy, 290 Ill. 360, 125 N.E. 374; Schiller Piano Co. v. Illinois Northern Utilities Co., 288 Ill. 580, 123 N.E. 631, 11 A.L.R. 454; Integrity Mut. Ins. Co. v. Boys, 293 Ill. 307, 127 N.E. 748; Ward v. Farwell, 97 Ill. 593, or whether we characterize it by other appropriate terms, all citizens, in their relationship one to the other, must so act and so contract as not to interfere with or infringe upon full execution of the constitutional power. Inasmuch as the Congress has been authorized by the constitution to enact the National Labor Relations Act, it follows that subsisting agree-

ments, negativing, abridging or infringing upon full effectuation of the legislative purpose must fall. We can not believe it was the purpose of the Supreme Court in the Jones & Laughlin case to limit this doctrine in any wise. To attribute such an intent to the court is to infer necessarily that it intended to overrule the reasoning of many authorities to the contrary. Holden v. Hardy, 169 U.S. 366; Knoxville Iron v. Harbison, 183 U.S. 13; Patterson v. The Eudora, 190 U.S. 169; McLean v. Arkansas, 211 U.S. 539; Chicago B. & Q. R. Co. v. McGuire, 219 U.S. 549, 567; Bunting v. Oregon, 243 U.S. 426, Ann. Cas. 1918A, 1043; New York Cent. R. Co. v. White, 243 U.S. 188, L.R.A. 1917D, 1 Ann. Cas. 1917D, 629. It follows that inasmuch as respondent's action denied full force and effect to the provisions of the National Labor Relations Act, the Board rightfully directed it to cease and desist."

N.L.R.B. v. J. I. Case Co., 7 Cir., 134 F. 2d 70, 72-73.

Accord, *N.L.R.B. v. Knoxville Pub. Co.*, 6 Cir., 124 F. 2d 875, 883, col. 1, expressly distinguishing the *Virginian Railway* case. With respect to the effect of the adoption of majority rule in the Railway Labor Act of 1934, Circuit Judge Sibley made the following clear and sound statement in *Cole v. Atlantic Terminal Co.*, 15 F. Supp. 131, 132, col. 1:

"As a member of a craft or class to be defined, each employee merges his individual right to bargain in the common right of the group as represented by the spokesman chosen by the majority."

Hirings of craft members are individual on all railroads, and when there is no craft schedule the carrier and the

individual member may embrace in the contract of hiring any terms whatever as to rates of pay, rules and working conditions, or they may be governed by unilateral announcement by the carrier. (Accord, *Williams v. Jacksonville Terminal Co.*, 315 U.S. at 386, 402.) Whether a genuine collective contract existed in the *Virginian Railway* case, the purported contract having been made with a company union, is at least open to question. We submit that the statements in the *Virginian Railway Co.* case concerning individual contracts are not to be construed to mean that where there is a true collective contract governing rates of pay, rules and working conditions of the craft, the carrier may also make individual contracts, nor construed to permit a contract with a minority representative governing representation of individual grievance claims arising under the collective contract entered into with the majority representative.

Whatever was said by this Court in the *Virginian Railway* case about individual contracts can lend no support to the inclusion of the word "engineer" in the Firemen's Schedule, because that Schedule is not a contract between the carrier and an *individual* but between the carrier and a minority *representative* collectively representing a small minority of engineers. The decree in that case directed the carrier to 'treat with' the true representative of the majority of the craft and not to treat with a representative other than the true one, and enjoined it from entering into any collective agreement with a representative other than the respondent, the true representative. The case is, accordingly, direct authority for striking the word "engineer" from the Firemen's Schedule because, equally

with the *Virginian Railway* case, the record here discloses that the Firemen's Brotherhood is *not* the true representative of the craft of engineers.

Under the Act, § 2, Fourth, the majority of the craft may designate the exclusive representative of the craft; and in § 2, Eighth, it is provided that the provisions of § 2, Third, Fourth and Fifth "are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them". Majority rule therefore becomes a part of each individual hiring, and accordingly the Congress in the exertion of its power over commerce has forbidden the carrier and minority representative Firemen's Brotherhood from contracting about "engineers". We find utterly inexplicable the astonishing assertion (R. 796) in the opinion of the Court below, made notwithstanding the existence of the Engineers' Schedule, viz.:

> "Under the decision of Virginian Railway Co. v. System Federation, supra, the engineer could have made an employment agreement with the Railway that he was to have the same rates of pay as those of the schedule of a British railway."

The question is not truly one of "individual" right; it is one of *craft* right. The craft, acting through a majority, determines the working conditions, and it was clearly ruled in 1923 that the question of who may be the representative "is and always has been one of the most important of the rules and working conditions in the operation of a railroad", *Penna. R. Co. v. U. S. R. R. Labor Board*, 261 U.S. 72, 83. Work is voluntary, not compulsory, and is

necessarily performed under the working conditions of the craft; and since the adoption of majority rule in the Railway Labor Act as amended in 1934 one of the working conditions is that *only* the representative designated by the majority may contract concerning the craft.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT AN INDIVIDUAL MEMBER OF THE CRAFT WHO ELECTS TO PROSECUTE AN INDIVIDUAL GRIEVANCE CLAIM UNDER THE ADJUSTMENT MACHINERY OF THE RAILWAY LABOR ACT, THROUGH A REPRESENTATIVE, MAY DO SO THROUGH A REPRESENTATIVE NOT DESIGNATED BY THE MAJORITY OF THE CRAFT.

A. We may assume that the individual engineer may alone decide whether a claim is to be asserted, i.e., that he may waive his individual claim or grievance[9] if he

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[9]A "grievance" as the term is used in the Railway Labor Act, is described in the House Report on the bill containing the amendments of 1934 as a dispute which develops from the interpretation and/or application of the contracts between the labor unions and the carriers. We here give a quotation from the Report found in *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235, 274 275:

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of **minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions.** The present Railway Labor Act provides for the establishment of boards of adjustment by agreement. In many instances, however, the carriers and the employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers may be equally represented on the board.

Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so

wills, *Illinois Central R. Co. v. Moore*, 5 Cir., 112 F. 2d 959, 965.

We may further assume that use of the adjustment machinery of the Railway Labor Act is voluntary, not compulsory, i.e., that it is always open to the individual engineer to elect instead to bring suit in a Court as a party plaintiff in complete control of his own suit, *Moore v. Illinois Central R. Co.*, 312 U.S. 630, 634-636.

We may further assume that the individual engineer, through any representative he may individually select, may handle an individual claim or grievance as to any matter outside the statutory scope of the collective agreement or Engineers' Schedule, which scope under § 2, First and § 3, First (i) embraces "agreements concerning rates of pay, rules, and working conditions". Illustrations are found in personal injury caused by an unsafe place to work or negligence of the carrier, matters of statutory duty and the like.

We may leave open, as was done in *Bloedel Donovan Lumber Mills v. International Woodworkers of America*, 4 Wash. 2d 62, 72, the question whether the individual engineer may, without use of any *representative*, personally handle his own case with the carrier.

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the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties.

We come, then, to our narrowed contention, and it is this: Since the locomotive engineers comprise a separate craft or class of employees, within the meaning of the Railway Labor Act, and since the majority of that craft or class have designated Engineers' Brotherhood as the representative of the craft or class for the purposes of the Act, § 2, Third, and Fourth (second sentence, it follows that when members of the craft, voluntarily elect to use the procedural machinery provided by § 3, First (National Railroad Adjustment Board) for the adjustment of individual claims or grievances that develop from the interpretation or application of the collective agreement between the carrier and Engineers' Brotherhood, the latter is the sole and exclusive representative of the members of the craft, and minority members of the craft who elect to take the adjustment benefits of the Act must take the benefits *cum onere;* therefore they may not use Firemen's Brotherhood nor any other minority *representative* in the pursuit of an adjustment under the machinery of the Act.

Since the decision of the Court below, the Attorney General, Honorable Francis Biddle, on December 29, 1942, gave a written opinion to the President, under the Railway Labor Act, wherein it was stated *inter alia:*

> "it is as important that there be collective action on the part of employees in the negotiation of settlements of grievances as it is that there be collective action in the negotiation of the provisions of the collective bargaining agreement which relate to wages, hours, and other conditions of employment. Disputes about grievances normally require interpretations of these latter provisions. Even when this is not the

> case, all members of the class or craft to which an aggrieved employee belongs have a real and legitimate interest in the dispute. Each of them, at some later time may be involved in a similar dispute."

The duty to bargain includes a duty to discuss interpretation with the exclusive representative of the majority. *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332, 342, 83 L. Ed. 682. As well stated in the report of the Attorney General's Committee on Administrative Procedure (1941):[19]

> "For the system of collective bargaining by the employer with the representative of a majority of the employees may be such that the interests of the individual employees who are members of the minority must yield to the interests of the majority. Majority representation requires that the will of the majority of employees should be binding upon all employees, so far as collective bargaining is concerned. Any other system would not be practically administrable. When the majority representatives negotiate an agreement with the employer, the minority employees must take their chances that their interests will be adequately protected, and if they are aggrieved, they will not be heard to complain, except within the organization. And the principle of majority representation extends not only to the making of initial or basic agreements, but also to modifications or amplifications or settlements of existing controversies."

The day to day adjustment of complaints or alleged violations of a collective agreement is a part of the *continuing* right and process of collective bargaining; as said on

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[19] Administrative Procedure in Government Agencies; in 14 Parts, Part 4, Railway Labor, The National Railroad Adjustment Board, The National Mediation Board (Washington, 1941), p. 9.

rehearing in the individual grievance case of *N.L.R.B. v. Newark Morning Ledger Co.*, 3 Cir., 120 F. 2d 262, 267, in ordering enforcement of the order in *Matter of Newark Morning Ledger Co.*, 21 N.L.R.B. 988:

> "The right of collective bargaining is, however, necessarily a continuing right. Collective agreements ordinarily, as in this case, run for definitely limited periods of time. Negotiations for their renewal must take place periodically and may commence, at least preliminarily, shortly after the signing of the preceding contract. Furthermore it may at any time become desirable or indeed necessary to bargain collectively for the modification of an existing collective agreement which has proved in practice to be in some respects unfair or unworkable or for the adjustment of complaints or alleged violations of such an agreement. Collective bargaining is thus seen to be a continuing and developing process by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned. It is not a detached or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result. Section 7, as we have seen, guarantees to employees the right to organize and engage in concerted activities for the purpose of collective bargaining. This right must necessarily continue so long as the prospect of future bargaining remains. It will thus be seen that the act guarantees to employees the continuous right to maintain labor organizations for the purpose of collective bargaining, after the signing of a particular collective bargaining agreement as well as before."

Accord, *Rapid Roller Co. v. N.L.R.B.*, 7 Cir., 126 F. 2d 452, 459.

In the *Matter of North American Aviation, Inc.*, 44 N.L.R.B. 604 (enforcement refused, on different grounds, *N.L.R.B. v. North American Aviation, Inc.*, 9 Cir., June 24, 1943, ... F. 2d ...), the National Labor Relations Board said:

Page 612:

> "Moreover, a collective contract is not complete as originally negotiated, nor is the process of collective bargaining complete upon the execution of a contract. After a contract has been negotiated and executed, it is continuously modified and supplemented by interpretations and precedents made by employer and employees from day to day in the course of their operations under the contract. This interpretation of the contract, no less than its negotiation, constitutes an integral part of the collective bargaining process."

Page 612, note 9:

> "'Collective bargaining is the process whereby representatives of a union meet with an employer or representative of an employer's association to fix the terms of employment for a certain period of time. But it includes more than the creation of an agreement . . . It involves also the *enforcement* and *interpretation* of the agreement throughout the months of its duration'. Carroll R. Daugherty, *Labor Problems in American Industry*, 1938 (Revised Edition), p. 450. See also *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332, in which the Supreme Court said: 'The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made. But we assume that the Act imposes upon the employer the further obligation to

meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them the true interpretation if there is any doubt as to its meaning.'"

The body of decided cases while small is uniformly to the effect that a minority craft member complaining of an individual grievance within the scope of the collective agreement governing the craft may not be represented as to such a grievance by a minority representative such as Firemen's Brotherhood here: *Matter of Mooresville Cotton Mills*, 2 N.L.R.B. 952, 955; *Mooresville Cotton Mills v. N.L.R.B.*, 4 Cir., 94 F. 2d 61; *Bloedel Donovan Lumber Mills v. International Woodworkers of America*, 4 Wash. 2d 62, 72; *Dooley v. Lehigh Valley R. R. Co.*, 130 N. J. Eq. 76 (Railway Labor Act), affirmed in 131 N.J. Eq., cert. den. (87 L. Ed. 38).

In *Mooresville Cotton Mills v. N.L.R.B.*, supra, the Fourth Circuit Court of Appeals stated, 94 F. 2d at 65, col. 1, that it was "in accord with the following conclusion of law" or ruling by the Board, in 2 N.L.R.B. 952, 955, supra:

> "On the basis of the aforementioned conduct of Matheson on September 24, 1935, the complaint alleges that respondent has refused to discuss certain grievances with the committee of the Union and has thereby engaged in unfair labor practices within the meaning of Section 8, subdivisions (1) and (5) of the Act. We feel we would be warranted in concluding that respondent's conduct constituted an actual refusal to discuss grievances with the committee, but this it is unnecessary to decide. It is not an unfair labor practice * * * for an employer to refuse to dis-

> cuss grievances with employee representatives when such representatives do not represent a majority of his employees. That the Union, on September 21, 1935, represented only a minority of respondent's employees is clear from the record."

There has been no departure from the ruling of the Board. *Rosenfarb, National Labor Policy* (1940), p. 195. The ruling applies *a fortiori* here, because under the National Labor Relations Act, § 9(a), 29 U.S.C.A. § 159(a), the proviso (which is not present in the Railway Labor Act) reads:

> "*Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

Note, the proviso does not say "representative". The House Report (quoted from in *Rosenfarb, The National Labor Policy*, supra, 226), stated:

> "Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action. And they are given added protection in various respects. First, the proviso of section 9(a) expressly stated that 'any individual employee or a group of employees shall have the right at any time to present grievances to their employer'. And the majority rule does not preclude adjustment in individual cases of matters outside the scope of the basic agreement."

Orders of the National Labor Relations Board requiring employers to cease negotiating with minority representatives upon the subject of grievances, have been upheld. In *National Licorice Co. v. National Labor Relations*

Board, 309 U.S. 350, 364, this Court upheld an order of the Labor Relations Board directing an employer to cease recognizing a minority representative as the representative of any of the employees for the purpose of dealing with the employer concerning "*grievances*, labor disputes, wages, rates of pay, hours of employment or conditions of work". And in *National Labor Relations Board v. Remington Rand, Inc.*, 2d Cir., 94 F. 2d 862, a case in which a grievance based upon the claimed failure of the employer to comply with a provision of the collective agreement was in issue (p. 866), the Court upheld an order of the Labor Relations Board requiring the employer to withdraw all recognition from minority unions as the representatives of its employees at certain plants "for the purpose of dealing with respondents concerning *grievances*, labor disputes, wages, rates of pay, hours of employment or conditions of work". (p. 874.) The Court held that such withdrawal of recognition was "an inevitable consequence of recognizing the Joint Board (majority representative) as the men's representative; the very purpose of the Act is to create a bargaining agent which shall be vested with exclusive power to treat with the employer, and there cannot be two representatives of the same unit". (p. 870.)

There are impelling reasons why the representation of grievances involving claims under a schedule may be lodged exclusively with the representative who has made the schedule agreement. Representation of such grievances by a representative other than the one who makes and interprets the schedule tends to circumvent, frustrate, or defeat the proper settlement of such grievances and the

maintenance and enforcement of the schedule negotiated by the majority, and thereby to defeat the purpose of the Act. It opens wide the door to an employer to indulge in disproportionate treatment, favoritism and discrimination (cf. as to an organized group and an unorganized remainder within a craft or class, *N.L.R.B. v. Wilson Line*, 122 F. 2d 809, 812, col. 2).

Each decision upon a claim arising under a schedule has an effect upon the interpretation or application of the schedule. By § 3, First, (m), awards of the Adjustment Board must be in writing, and "the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award". The decisions upon prior analogous claims amount to what may be called the "common law" of schedule interpretation. Such decisions are cited and argued by the representative and manifestly carry much weight in the application of the schedule to a pending claim.[11]

> "The written contract is a general constitution upon which a body of industrial law is built. The rules and regulations first set forth in the contract are elaborated and changed from day to day in the settlement of grievances and the interpretation of the con-

[11] "The National Railroad Adjustment Board has repeatedly recognized this fact. In the following illustrative decisions of the National Railroad Adjustment Board, First Division, the awards were based upon the following findings:

Award No. 534. "The settlements made under the rules involved support of the employees' contention."

Award No. 571. "Under settlements on this property claim is supported."

Award No. 837. "On the basis of previous settlements by the carrier in connection with the rule in question, the employees' contention in this particular case is supported."

Award No. 4992. "The prior settlement on this railroad, involving similar claims, warrant an affirmative award."

> tract. Gradually they evolve into a body of industrial common law, developed in a democratic manner."
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> Clinton S. Golden and Harold J. Rüttenberg, *The Dynamics of Industrial Democracy*, p. 43, quoted in *Matter of North American Aviation Inc.*, 44 N.L.R.B. 604, 612, note 8.

It is therefore of great importance to the craft representative that it shall have the right to handle all claims (where representation is desired) which thus affect the application and enforcement of the schedule. A minority representative, under the decision of the Court below, may interpret the schedule contrary to the interpretation of the craft representative, and settle a case in conformity with such unrecognized interpretation. An illustration of this practice is shown by Exhibit 11 (R. 311), where the Firemen's Brotherhood compromised a claim for one-half of the amount appearing due under the Engineers' Schedule. A compromise by which a claim is settled for one-half of its value is not a settlement in accordance with the "recognized interpretation" of the Engineers' Schedule. Such a practice plainly undermines the enforcement of the schedule; it tends to destroy the "recognized interpretation" by making an exception to it; it violates the Engineers' Schedule rule, Article 32, Section 22 (R. 452), that the controversy "will be handled in accordance with the recognized interpretation"; and it undercuts the authority of the craft representative to interpret and enforce its own rule. To accede to the right of a minority representative to make such settlements in one case is to concede it in all cases, with the result that many or all cases might be so compromised by a minority. If the carrier

finds that it can settle claims on a more favorable basis with the minority representative than with the craft representative, as in the instance illustrated by Exhibit 11 (R. 311), it will naturally make known its preference for dealing with the former. It will thus play one organization against the other, and one interpretation against another. Concessions made by the minority representative will call for concessions by the craft representative, and thus a premium will be placed upon compromise rather than upon strict enforcement. Thereby the full benefits of the schedule are frittered away and lost to the craft.

There is no more room for dual representation in the presentation of grievances arising under a schedule than there is for "pluralism" in the making of a schedule. If such dual representation is permitted, there will be constantly recurring disputes, and the Act will fail of its purpose as "an instrument of peace rather than of strife". (*T. & N. O. R. Co. v. Ry. Clerks*, 281 U.S. 548, 570.) The whole purpose and intent of the statute is to settle such controversies in the selection of the craft representative and thereafter to constitute this representative as the sole spokesman and bargaining agent of the craft.

B. Findings 7 and 8 about a "usual manner" of handling "individual claims and grievance cases" is in reality but a misplaced and erroneous legal opinion that endeavors to disregard the dominant purposes of the Act and place an insupportable weight upon the phrase, "the usual manner", in § 3 First, (i), which we quote:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of

grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * * shall be *handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes;* but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party[12] to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Italics supplied.)

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[12]With respect to the criticism by the Court below of the National Railway Adjustment Board's decisions in *Gooch v. Ogden Union Ry. Co.*, R. 808, and *Rudd v. Minneapolis St. P. & etc. Ry.*, R. 809, we adopt as our argument the reasoning of those cases rather than the reasoning of the Court below; and particularly we adopt as our argument here the reasoning in the Memorandum (here reprinted as Appendix B) filed in Behalf of Railway Labor Executives' Association (of which the intervener Firemen here is a member) before the Attorney General's Committee on Administrative Procedure, in re National Railroad Adjustment Board. *Inter alia* it was there said on behalf of that Association (as spokesman for its members, including the present intervener Firemen):

"In regard to the authority of representatives to act for all employees in the execution of colective agreements, it has been repeatedly held that such agreements, when made are binding upon those individual members of the representative organization who favor the terms of the agreement, those members who oppose, and those employees who are not even members of the organization. It appears only reasonable that the authority which thus broadly represents all employees in the making of these contracts should have equal power to act for all in securing their

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interpretation. This too appears to have been the intention of the framers of the Railway Labor Act, for it is provided that the employees' representatives are to have full authority to adjust disputes in private conference with their employers. Thus Section 2, Second, provides as follows:

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition in conference between representa-

The history and purpose of the provision are clear:

> "The purpose of this salutory provision is to require the parties, before seeking the assistance of the government, to exhaust their own resources in an attempt to settle labor disputes."
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> *Spencer, The National Railroad Adjustment Board* (Studies in Business Administration, Univ. Chicago, April, 1938).

> "Throughout its career the [Railroad Labor] Board [under the Transportation Act of 1920] 45 U.S.C.A. § 135] held steadfastly to this rule and refused to

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tives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereto interested in the dispute.'

See further to the same effect the following quotation from Section 2, Sixth:

'In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of such notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: * * *'

Disputes which are not adjusted by conferences as provided in the two sections above quoted may then find their way to the Adjustment Board. Throughout all of these statutory provisions there is no indication that the framers of the statute had any intention to provide a means for adjusting disputes among employees. The only type of disputes for which provision is made are those where a carrier or carriers adopt one position and an employee or employees a contrary position this is

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the only type of dispute which can be referred to the Adjustment Board. Section 3, First (i) of the Act reads as follows:

'The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including

entertain any application for a hearing until this procedure has been complied with."

Wolf, The Railroad Labor Board (University of Chicago Press, 1927), p. 351.

There must be an exhaustion of negotiating effort to settle disputes, i.e., they "shall be handled in the usual *manner* up to and including the chief operating officer of the carrier". "Manner" merely relates to method of exhaustion.

> cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."
>
> Summarizing all of the foregoing, therefore, the statute clearly intended to merge the individual interests of individual employees into the collective interest of the craft or class to which they belong. This collective interest can only be expressed through a representative selected for that purpose. Such a representative is empowered to make agreements obligating the individual and to represent him in the consideration of grievances and disputes. In either case the act of the representative will bind the individual, even when against the latter's will. Hence, we conclude that when an individual's rights are bound up in a collective dispute between his employer and the collective bargaining group of employees to which he belongs, the representative has full authority to submit such a dispute to the National Railroad Adjustment Board, if it cannot be otherwise adjusted, to conduct the case before the Board
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> according to its best judgment, and to bind the individual by any decision which may be reached. The individual himself is no more a party to the case nor 'involved' therein than is a stockholder of the carrier corporation, and is therefore entitled to no notice of the pendency of the proceeding under the terms of the Railway Labor Act."

The phrase, "handled in the usual manner", was originated in the United States Railroad Administration of 1918 and 1919. Prior thereto, under private control of railroads, the chief operating officer on each railroad had the last word upon individual grievances and disputes unless a strike was called. His decision was a final decision. That finality of decision was taken away when the Government took control of the railroads, under the Director General's Order No. 8, which ordered *inter alia:*

> "Matters of controversy arising under interpretations of existing wage agreements and other matters not relating to wages and hours will take their usual course, and in the event of inability to reach a settlement will be referred to the Director General."

Appellate machinery for review of the chief operating officer's decision was needed. On March 22, 1918, bipartisan Railway Board of Adjustment No. 1 was created by General Order No. 13 (reprinted here as Appendix C), covering the four engine and train service Brotherhoods. In giving appellate jurisdiction from decisions of chief operating officers on particular railroads, the following language was used therein *inter alia:*

> "10. Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding will be handled in their usual manner by general committees[13] of the employees up to and including the chief operating officer of the railroad * * *."

[13] "General Committees." Such committees are common in railroad labor organization. Two "general committees" are parties to the present litigation, as may be seen from their names.

Under identical texts, General Orders 29 and 53 created Boards Nos. 2 and 3 for other of the organized crafts that held schedules or collective agreements. There was a residue of employes in crafts either unorganized or holding no collective agreement. They were covered by the Division of Labor's Circular No. 3 of August 30, 1918, reprinted here as Appendix D. As to them, it was provided *inter alia* that grievances or controversies "will be handled in the usual manner by the individual, his representative, or by committees of employes, up to and including the chief operating officer of the railroad", before right of appeal to the Division of Labor.

Thereafter, the Director General promulgated General Order No. 65, reading:

> "Grievances, affecting employees belonging to classes which are or will be included in national agreements which have been, or may be, made between the United States Railroad Administration and employees' organizations will be handled as follows:
>
> (a) Grievances on railroads not having agreements with employees, which grievances occurred prior to the effective date of any national agreement, will be handled by railroad officials in the usual manner with the committees and officials of the organizations affected, for final reference to the Director of Labor as provided in Circular No. 3 of the Division of Labor. Grievances on railroads *having agreements* with employees, which grievances occurred prior to the effective date of any national agreement will be handled by railroad officials *in the usual manner with the committees and officials of the organizations with which the agreement was made*, for final reference to Railway Boards of Adjustment, as provided in general orders creating such Boards. Decisions made as the

result of such reference will apply to the period antedating the effective date of such national agreement and from the effective date of that agreement will be subject to any changes that are brought about by the national agreement.

(b) Grievances which occurred on the effective date of any national agreement, and subsequent thereto, will be handled by the committees of the organizations signatory to such national agreements, for final reference to the appropriate Railway Board of Adjustment, except on roads where other organizations of employees have an agreement with the management for the same class of employees, in which case grievances will be handled under that agreement by the committees of *the organization which holds the agreement*, for final reference to the Director of Labor as provided in Circular No. 3 of the Division of Labor." (Italics supplied.)

That clarifying General Order is to be considered as interpreting the original General Orders and the Circular, in analogy to the settled rule as to a clarifying statute.[9] From the foregoing history it is clear that the phrase "usual manner" in the Railway Labor Acts of 1926 and 1934 relates solely to method, not to persons. It is addressed solely to exhaustion of intramural negotiating effort on the particular railroad, before an adjustment appeal "off the property". It does not identify who, for the employes, shall negotiate. Until the adoption of majority rule, the employer could negotiate with any and all groups, majority and minority. However, the 1934 Act had different sponsorship (Federal Coordinator of

[9] *Bailey v. Clark*, 88 U.S. 284; *U. S. v. Freeman*, 44 U.S. 556; *Cope v. Cope*, 137 U.S. 682; *Wetmore v. Markoe*, 196 U.S. 68.

Transportation), and majority rule became the law. Majority representation means exclusive representation. There must still be handling in the "usual manner", i.e., exhaustion of negotiating effort on the particular railroad, through the hierarchy of carrier officers up to the chief operating officer. That handling in the "usual manner" must be, since 1934, by the majority representative of the craft, the exclusive representative. In its origin in General Order No. 13 creating Railway Board of Adjustment No. 1 for the train service crafts (engineers, firemen, conductors, brakemen) the phrase "handled in the usual manner" was immediately followed by the words, "by general committees". Repetition occurred in General Orders Nos. 29 and 53 creating Boards No. 2 (shop and mechanical) and No. 3 (telegraphers, clerks, et al.). When one comes, however, to the residue of crafts either unorganized or freshly in organization throes and yet without Schedules, "manner" or procedural method, i.e., exhaustion of negotiating effort on the property, is the same: the phrase remains, "handled in the usual manner", but the consequence of that antecedent becomes, "by the individual, his representative or by [n.b., not a brotherhood 'general committee' but simply in the ordinary sense:] committees of employees". The point, demonstrably clear, is that "manner" does not determine who, for the employes, shall "handle". And that origin and history has one further teaching: it shows the embryo of exclusive majority rule, in that only the majority representative, i.e., the "general committee" of the organized craft, could "handle", i.e., present and negotiate the individual grievance or claim within the scope of a

Schedule; and General Order No. 65 left no vestige or shadow of doubt that it must be the general committee of "the organization with which the agreement was made" the one "which holds the agreement". Of course, the majority rule, created by the War Administration, ended on March 1, 1920, with the termination of Federal Control, and did not revive until the Congress in 1934 made majority rule statutory and exclusive.[15]

REQUESTED DISCUSSION.

(1)

WHETHER RESORT TO THE DECLARATORY JUDGMENT PROCEDURE IS APPROPRIATE IN THE CIRCUMSTANCES.

The form of the question is substantially the same as the one put in *Great Lakes Dredge & Dock Co. v. Huffman*, No. 849, October term, 1942 (87 L. Ed. *1021), decided on May 24, 1943, i.e., on the same day that the order granting certiorari was filed in the case at bar. The cited case turns on the distinction between jurisdiction over a case and the propriety of exercising that jurisdiction. Clearly, there is a justiciable controversy in our case, and we therefore turn to discussion of the propriety of exercising that jurisdiction in the circumstances.

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[15]Before majority representative was made an exclusive representation, there was hectic conflict between the old National Labor Relations Board (*Houde Engineering Co.*, 1 N.L.R.B. (old) 35), on one side, and General Johnson and Mr. Richberg on the other, the latter contending for proportional representation or pluralism, i.e., the majority representative representing only the majority leaving a minority to choose separately a minority representative, and unorganized workers to act individually for themselves. Generally, see Lorwin and Wubnig, *Labor Relations Boards* (Brookings Institution, 1935), pp. 109-112, and 268-271; Rosenfarb, *National Labor Policy* (1940), p. 224.

The exercise of a judicial discretion to refuse to exercise jurisdiction in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, was based upon comity between "the state and federal courts in the administration of the Federal Declaratory Judgments Act" (316 U.S., at 494). At bar, there was not and is not any case pending in any state Court.

Another head of comity is raised in *Great Lakes Dredge & Dock Co.*, supra, i.e., the declaratory judgment procedure is not appropriate when the circumstances are that the defendant is a state tax officer and the state has afforded an adequate statutory remedy by suit to recover taxes back; in such case a federal declaration "will be withheld in the sound discretion of the court".

The field of comity is, of course, broader than the foregoing particular instances, but does not extend to the case at bar. Here, as we will discuss under head (2), infra, the contract questions present are governed by federal law, but if they were governed by state law comity would not call for a declaration to be withheld in the exercise of a discretion to withhold. Speaking generally, the rule of comity is applied when there is federal interrelationship with *one* state; here, the Firemen's Agreement, R. 468-632, "dated at San Francisco, Calif., June 1, 1939", R. 632, indicates that it is to be *performed* in the *eight* states[16] over which Pacific Lines of

[16]Washington, Oregon, California, Nevada, Utah, Arizona, New Mexico and Texas. Article 19, R. 524, of the Firemen's Agreement lists the cities and towns in those states wherein are located "all division or district terminals at which engine crews are usually changed". Article 3, R. 478-480, lists the termini of assigned runs in through passenger service and main line pooled freight service. Article 40, R. 595-596, lists the seniority districts. Exhibit No. 3, R. 117, shows the territorial distribution of engineers and firemen. Compare Exhibit No. 4, R. 120.

the carrier extend. The Civil Code of California,[17] § 1646, reads as follows:

> "A contract is to be interpreted according to the law and usage of the place where it is to be *performed;* or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." [Italics supplied.]

Further, the Firemen's Agreement is not a contract of hiring; hirings are individual and occur in each of the eight states, but under the "rates of pay, rules and working conditions" (Railway Labor Act of 1934, § 2) prescribed in the collective agreement entered into with the representative of the craft. The Railway Labor Act of 1934, § 2, Eighth, enacts that "the provisions of" § 2, Third, Fourth and Fifth "are hereby made a *part* of the contract of employment between the carrier and each employee". In short, the Firemen's Agreement, as the collective contract of the craft, co-operates with an act of Congress in supplying the terms of the individual contracts of employment. It seems to us, therefore, that judicial discretion should favor the *granting* of a Federal declaratory decree, rather than a refusal to exert the undoubted power or jurisdiction to make a declaration.

Speaking generally of the criteria of discretion, *Borchard, Declaratory Judgments*, says (1st ed. 107; 2d ed., 299):

> "The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in

[17] As to what the rule may be in other states, when performance is to be in a number of states, see 12 *C. J.* 451, note 77, and 15 *C. J. S.* 889, note 36.

> clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed."

Plainly, each of those results can be accomplished by a declaratory decree here.

The report of the Judiciary Committee of the Senate (reprinted in the Appendix to Borchard's treatise), which was written by Prof. Borchard,[18] states (Borchard, 1st ed., 629; 2d ed., 1043):

> "The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice."

In the memorandum that he filed during the hearings, and which was printed at pages 70-81 in the transcript[19] of the hearings, he said:

> "The declaratory action in England and other jurisdictions, which have enjoyed this form of pro-

[18] Borchard, 2d ed., 312, footnote 5.

[19] HEARINGS Before A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE, Seventieth Congress, First Session, on H. R. 5623, AN ACT TO AMEND THE JUDICIAL CODE BY ADDING A NEW SECTION, TO BE NUMBERED 274D, APRIL 27 and MAY 18, 1928; Printed for the use of the Committee on the Judiciary. UNITED STATES GOVERNMENT PRINTING OFFICE WASHINGTON: 1929"

cedure, may be brought in two types of cases: (a) Where no other form of action is possible, as in the case of Guaranty Trust Co. v. Hannay [(1915), 2 K. B. 536; 12 A.L.R. 1, at 13-26], in which the Guaranty Trust Co. brought an action for a declaratory judgment that they were under no duty to repay to Hannay, as the latter had privately claimed, the amount received by the Guaranty Trust on certain forged bills of exchange, and (b) where some more coercive action for damages or injunction would have been possible, but the plaintiff is content with a milder judgment, merely declaring his rights as claimed in his petition or complaint."

Now, if the Norris-LaGuardia Act (which we will discuss under another head, infra) gives an immunity from an injunction, then this case is of the first type, because "no other form of action is possible"; if such immunity does not exist, then the case is of the second type.

"At the outset, it may be remarked that in form [the action for a declaratory judgment] differs in no essential respect from any other action, except that the prayer for relief does not seek execution or performance from the defendant or opposing party. It seeks only a final determination, adjudication, ruling, or judgment from the court, but the conditions of the usual action, procedural and substantive, must always be present, namely; the competence or jurisdiction of the court over parties and subject-matter, the capacity of the parties to sue and be sued, the adoption of the usual forms for conducting judicial proceedings (including process, pleadings, and evidence), the existence of operative facts justifying the judicial declaration of the legal consequences, the assertion against an interested party of rights ca-

pable of judicial protection, and a sufficient legal interest in the moving party to entitle him to invoke a judgment in his behalf. **The fact, however, that no coercive decree is sought or is attached to the judgment enables actions to be brought for a declaratory judgment on two different types of operative facts: (a) those which might also have justified an action for an executory (coercive) judgment or decree, or (b) those which are not susceptible of any other relief.''**

Borchard, 2d ed., 25-26.

''The declaration is a conclusive determination of the rights of the parties, and is *res judicata*. As already observed, it is not, however, either strictly equitable or legal relief. Albeit its historical affinity is equitable, the proceeding is special and *sui generis*, disregarding the distinctions between law and equity and the technical limitations of both. Consequential or executory relief may be demanded either in association with or as a supplement to declaratory relief, should the declaration be not observed and coercion become necessary. **The declaration is an authoritative adjucation and guide to conduct, and rarely, so far as records disclose, has it become necessary again to invoke the aid of the court to carry a declaratory judgment into forceful effect.** Whether or not the original declaratory judgment or decree reserves the liberty to apply for further relief, if necessary, such liberty is always implied and the American statutes make special provision for it.''

Borchard, 2d ed., 438-439.

'' 'Further relief' obviously means coercive or executory relief which may be granted on the original

petition or a subsequent motion or petition. This merely carries out the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective. Even a petition for 'further relief' is unnecessary, if the court retains jurisdiction to issue further orders to make its judgment effective. And if it considered that a further declaratory judgment or decree would accomplish this purpose, there is no reason why it would not be proper. Section 8 of the Act provides that it may be granted whenever 'necessary or proper', although, as already observed, the very fact that ancillary, or, as it is sometimes called, 'correlative' coercion is obtainable on motion or petition, in which the declaratory judgment is *res judicata*, makes the demand for it rare. All that is necessary is that the court, on reasonable notice, require the losing party to show cause why further relief should not be granted forthwith. Since the 'further' or coercive relief could have been demanded in combination with the declaration, in the same action, there is no reason why it cannot be demanded in an ancillary motion should the declaration be disobeyed or disregarded."

Borchard, 2d ed., 441.

The case at bar may be considered from two viewpoints: (1) judicial protection of plaintiff's right of representation, *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U.S. 548, 567, et seq.; (2) judicial protection against the no-right of defendant and intervener, as to which *Borchard*, 2d ed., 1014, says:

"The *status quo* may be preserved against impairment by seeking to prevent the defendant from vio-

lating a contract or the law. The plaintiff thus asserts the defendant's no-right[20] or disability to act to the plaintiff's injury. This type of security has usually been achieved by a bill of injunction, and while in these cases the prayer for a declaration is often combined with a request for injunction or other relief, an injunction is not always obtainable, whereas the declaration will usually serve as an adequate measure of preventive relief. **The continuation of the act complained of is as a rule interrupted by a declaration of its illegality or invalidity, and that suffices.**"

A precedent of a declaratory decree in a labor dispute, notwithstanding refusal of an injunction, is found in *Bowie v. Gonzalez*, 1 Cir., 117 F. 2d 11. The construction and interpretation of statutes "is a common quest of declaratory action", *Borchard*, 2d ed., 788-789; and 529.

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[20] In an early study, Borchard, The Declaratory Judgment—A Needed Procedural Reform (November, 1918), the use of this term is explained as follows (28 Yale L. J. 2, note 4): "In the course of this study we shall adopt Prof. Wesley N. Hohfeld's valuable analysis of jural relations as set forth in (1913) 23 YALE LAW JOURNAL 16. These relations may most readily be presented in Prof. Hohfeld's scheme of opposites and correlatives:

Jural Opposites	right	privilege	power	immunity
	no-right	duty	power	liability
Jural Correlatives	right	privilege	liability	immunity
	duty	no-right	liability	disability

The importance of this analysis is revealed throughout the subject of declaratory judgments. See particularly *Guaranty Trust Co. v. Hannay* (C. A.) [1915] 2 K. B. 536, 548, Buckley, L. J., and p. 51, Bankes, L. J."

(2)

WHETHER ANY QUESTIONS OF THE CONSTRUCTION OF THE CONTRACTS INVOLVED ARE GOVERNED BY STATE OR BY FEDERAL LAW.

The petition for certiorari in the present case relates to the exclusive right of representation under the majority rule provision of the Railway Labor Act of 1934. The petition therefore presents solely a federal question. *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, and cases cited therein.

The case at bar is not dependent on diversity of citizenship. If it be thought that it goes beyond the federal question of who can contract, into the terms of a contract, then the case becomes one wherein Congress has, through the Railway Labor Act of 1934, § 2, Eighth, occupied the field of contract by prescribing part of the terms of the contract of employment; and through § 2, First, and related provisions, occupied the field of collective contracts with crafts, "in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof"; and through § 2, Sixth, and § 3, First, (i), has occupied the field of adjustment of disputes under collective contracts. The collective contracts therefore raise legal relations "governed by a 'federal common law'" under the reasoning in *O'Brien v. Western Union Tel. Co.*, 1 Cir., 113 F. 2d 539, 541, cited with apparent approval in *Sola Elec. Co. v. Jefferson Elec. Co.*, supra (317 U.S. 173); and *Philco Corp. v. Phillips Mfg. Co.*, 7 Cir., 133 F. 2d 663. In the latter case, at page 671, it is said:

"But to say that Congress has 'occupied the field', as in Postal Telegraph-Cable Co. v. Warren-Godwin Co., 251 U.S. 27, 31; Western Union Telegraph Co. v. Boegli, 251 U.S. 315, 316, and O'Brien v. Western Union Telegraph Co., 1 Cir., 113 F. 2d 539, 541, is only another way of stating the rule that federal courts may go beyond mere interpretation of the express words used in an Act of Congress, to decide **interstitial and cognate issues** so as to effectuate the evident policy of the Act, either express or implied, as in Awotin v. Atlas Exchange Bank, 295 U.S. 209, 213, 214; Board of Commissioners v. United States, 308 U.S. 343, 351-353, 354; Deitrick v. Greaney, 309 U.S. 190, 200; D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U. S. 447, 459, 461; Prudence Corporation v. Geist, 316 U.S. 89, 95; Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173."

Congress through the Railway Labor Act sought peace in railway labor relations, which will be promoted by *one* set of federal rules governing railway collective contracts; it could hardly have intended to promote discord arising from dissonance in a chorus of 48 voices. While the lines of defendant carrier extend over only eight states, some provisions of the collective contracts thereon are common throughout the nation. A dispute over the meaning of a provision in a railway collective contract should be settled *once* for all and not left to create grievances 47 times more. An engineer, fireman, conductor or brakeman whose daily run crosses a state boundary (and many do) should not be told that his contract has one meaning on part of his run and a different meaning on the remainder.

(3)

WHAT BEARING, IF ANY, THE NORRIS-LA GUARDIA ACT HAS ON THE PROPRIETY OF GRANTING THE RELIEF SOUGHT.

We will assume,[21] without conceding, that there is present a "labor dispute" within the meaning of the Act.

As to the substantive effect of the Act, enacted in the year 1932, *U. S. v. Hutcheson*, 312 U.S. 219, gave it such effect with respect to an earlier Act enacted in the year 1890. The majority rule provision of the Railway Labor Act was enacted in 1934. Moreover, the acts in the case at bar do not fall within any of the specific categories of acts immunized under § 4 of the Norris-LaGuardia Act.

There is, therefore, no prohibition against a restraining order or injunction, *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 562-563, but simply regulation of the procedure to be followed in obtaining an injunction. None has yet been asked in this case. If, subsequent to the

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[21]The question of what is a "labor dispute" under the "big" and "little" "Norris-LaGuardia" acts is currently a highly controversial one. See, e.g., *Markham & Callow v. International Woodworkers*, (Oregon, March 23, 1943), 135 Pac. 2d 727 collecting and reviewing federal and state decisions.

In a controversy between two rival unions as to which one represented a majority, it was held in *Oberman & Co. v. United Garment Workers of America*, 21 F. Supp. 20, at 26, col. 2, that after the National Labor Relations Board had investigated the controversy and issued a certificate of representation, the certificate terminated the controversy and therefore there was no longer a "labor dispute" within the meaning of the Norris-LaGuardia Act. The certificate there finds equivalent here in the admissions of the pleadings of defendant and intervener that plaintiff is the representative duly designated by the majority of the craft of engineers. For a case of union rivalry wherein there was neither certificate nor admission and consequently a "labor dispute", see *Fur Workers Union Local No. 72 v. Fur Workers Union No. 21238*, 105 F. 2d 1, affirmed in 308 U.S. 522.

declaratory judgment, an injunction be desired, the Declaratory Judgments Act, (2), says that such further relief may be granted upon application. *Borchard*, 2d ed., 441, quoted supra, explains that the application for "further relief" may be made by "ancillary motion" within the same cause "should the declaration be disobeyed or disregarded". If and when such motion should be made hereafter in the present case it will be time enough to comply with the procedural requirements of the Norris-LaGuardia Act, and it will be the situation *then* existing that will condition such compliance.

The prohibitions of the Norris-LaGuardia Act are against an injunction, not against some other remedy. The Act does not prohibit a declaratory judgment; indeed, the Declaratory Judgments Act was enacted more than two years later than the Norris-LaGuardia Act. As said by a co-draftsman[22] of the Norris-LaGuardia Act (Frankfurter and Greene, *The Labor Injunction*, page 220), "all other remedies in federal courts * * * remain available". The evil sought to be ended by the Norris-LaGuardia Act is a matter of familiar judicial and political history, and is entirely unrelated to declaratory judgments. Moreover, the evil related to injunctions obtained *by* employers; at bar, the employer is a defendant.

The public policy that moved the Congress in 1934 to enact majority rule in railway labor relations is perfectly consistent with the public policy stated earlier in the

[22]In Frankfurter and Greene, *The Labor Injunction*, 226, footnote 61, it is said: "Having long entertained the views expressed herein, one of the present writers, at the suggestion of the Senate Subcommittee on the Judiciary, collaborated with others likeminded in drafting the bill under discussion."

Norris-LaGuardia Act, and there can be no conflict whatever between the two Acts through a declaratory judgment interpreting and applying the Congressional enactment of majority rule.

Dated, San Francisco, California,
September 17, 1943.

Respectfully submitted,

GEORGE M. NAUS,
Attorney for Petitioner.

CLARENCE E. WEISELL,
(Horn, Weisell, McLaughlin & Lybarger),
Of Counsel.

(Appendices A, B, C and D Follow.)

Appendix A

The Railway Labor Act of May 20, 1926, as amended June 21, 1934, c. 691, 48 Stat. 1185 (45 USC §§ 151-163).

DEFINITIONS.

SECTION 1. [45 U.S.C. § 151]. When used in this Act and for the purposes of this Act—

[Defines: First, "carrier". Second, "Adjustment Board". Third, "Mediation Board". Fourth, "commerce". Fifth, "employee". Sixth, "representative". Seventh: "district court"; "circuit court of appeals".]

GENERAL PURPOSES.

SEC. 2. [45 U.S.C. § 151a.] The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties.

[45 U.S.C. § 152.] First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties, without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their

own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individual, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements

concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment

between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. * * *

NATIONAL BOARD OF ADJUSTMENT
GRIEVANCES—INTERPRETATION OF AGREEMENTS.

SEC. 3. [45 U.S.C. § 153.] * * *

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", * * * and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act. * * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees. * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them. * * *

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he re-

sides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. * * *

NATIONAL MEDIATION BOARD.

SEC. 4. [45 U.S.C. § 154.]

FUNCTIONS OF THE MEDIATION BOARD.

SEC. 5. [45 U.S.C. § 155.]

SEC. 6. [45 U.S.C. § 156.]

ARBITRATION.

SEC. 7. [45 U.S.C. § 157.]

EMERGENCY BOARD.

SEC. 10. [45 U.S.C. § 160.]

GENERAL PROVISIONS.

SEC. 11. [45 U.S.C. § 161.]

SEC. 12. [45 U.S.C. § 162.]

SEC. 13. [Amends Judicial Code, § 128(b), and the Act of February 13, 1925.]

SEC. 14. [45 U.S.C. § 163.] [Repeals prior legislation.]

The Clayton Act, § 20, of October 15, 1914, c. 323, 38 Stat. 738 (29 USC § 52).

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees,

or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The Norris-LaGuardia Act of March 23, 1932, c. 90, 47 Stat. 70 (29 USC §§ 101-115).

§ 1 [29 USC § 101]. "No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections."

§ 2 [29 USC § 102]. "In the interpretation of sections 101-115 of this title and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in such sections, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation

of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are hereby enacted."

§ 3 [29 USC § 103]. "Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:"

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization."

§4 [29 USC § 104]. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

§ 5 [29 USC § 105]. "No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title."

§ 6 [29 USC § 106]. "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

§ 7 [29 USC § 107]. "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 101-115 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may

be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

§ 8 [29 USC § 108]. "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which

is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

§ 9 [29 USC § 109]. "No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in sections 101-115 of this title."

§ 10 [29 USC § 110]. "Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall upon the request of any party to the proceedings and on is filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character."

§ 11 [29 USC § 111]. "In all cases arising under section 101-115 of this title in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided*, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehaviour, misconduct or disobedience of any officer of the court in respect to the writs, orders or process of the court."

§ 12 [29 USC § 112]. "The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding."

§ 13 [29 USC § 113]. "When used in sections 101-115 of this title, and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same

or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or

may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

§ 14 [29 USC § 114]. "If any provision of sections 101-115 of this title or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of such sections and the application of such provisions to other persons or circumstances shall not be affected thereby."

§ 15 [29 USC § 115]. "All acts and parts of acts in conflict with the provisions of sections 101-115 of this title are hereby repealed."

The Declaratory Judgments Act of June 14, 1934, c. 512, 48 Stat. 955, adding section 74d to the Judicial Code (28 USC § 400).

"(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, or complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be

deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

Appendix B

[Extracts from Memorandum filed by the attorneys for Railway Labor Executives' Association, before the Attorney General's Committee on Administrative Procedure.]

BEFORE THE
ATTORNEY GENERAL'S COMMITTEE ON
ADMINISTRATIVE PROCEDURE

IN RE: NATIONAL RAILROAD
ADJUSTMENT BOARD

MEMORANDUM
Filed in Behalf of
RAILWAY LABOR EXECUTIVES' ASSOCIATION

* * * * * * *

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4. The Question of Whether Notice Should Be Given to Employees Who Are Parties to a Given Dispute But Who May Be Affected By Any Decision Rendered by the Board.

From time to time cases come before the Adjustment Board involving controversies as to the interpretation of agreements where the employees' representative has accepted an interpretation favorable to the interests of certain employees, while the contrary position adopted by the carrier is favorable to other employees. A question has arisen as to whether those individual employees whose interests will be harmed if the claim of the representative

is sustained are entitled to independent notice of the pendency of the proceeding and opportunity to intervene.

It appears to us that this question has been magnified out of all proportion to its true significance. Out of more than 5,000 awards made by the National Railroad Adjustment Board to date only two have been challenged by individual employees on the ground that they received no notice of the proceedings, and these two cases involved a total of three workmen. However, as considerable space has been devoted to this issue both in the carriers' presentation and in Monograph No. 17, we wish to discuss it in detail.

It will be noticed that the tentative memorandum of agreement above referred to does not cover this point. The position of the railway labor organization is that employees such as those in question are not entitled to notice either under the provisions of the Railway Labor Act or from any consideration of policy.

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The Railway Labor Act, Section 3, First (j), reads as follows:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them."

It will be seen from the above quotation that the statute requires notice to all employees "involved" in the dispute. The question, therefore, is whether employees whose

individual interests do not correspond with the position of the employees' representative are "involved," within the meaning of the statute. It is the position of the Railway Labor Organizations that such employees are not parties to the dispute and are not involved in it in any way.

The whole intent of the Railway Labor Act is to foster the development of bi-partisan handling of labor disputes on the railroads. The two parties contemplated by the statute are on the one hand the carrier, and on the other all of the employees who are members of a given craft or class (the collective bargaining unit recognized by the Act), acting through their chosen representative. This purpose is apparent throughout the statute as the following examples will demonstrate.

The Act provides that:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." (Section 2, Fourth.)

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The Act establishes means for the selection of representatives of employees in case of dispute and provides that when a representative is selected and certified by the National Mediation Board—

> "* * * Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purpose of this Act." (Section 2, Ninth.)

It is contemplated that in the making of agreements concerning rates of pay, rules and working conditions the

chosen representative shall speak for all employees, for it is provided that:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes, shall be agreed upon within ten days after the receipt of said notice, etc." (Section 6.)

In regard to the authority of representatives to act for all employees in the execution of collective agreements, it has been repeatedly held that such agreements, when made, are binding upon those individual members of the representative organization who favor the terms of the agreement, those members who oppose, and those employees who are not even members of the organization. It appears only reasonable that the authority which thus broadly represents all employees in the making of these contracts should have equal power to act for all in securing their

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interpretation. This too appears to have been the intention of the framers of the Railway Labor Act, for it is provided that the employees' representatives are to have full authority to adjust disputes in private conference with their employers. Thus Section 2, Second, provides as follows:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition in conference between representatives designated and authorized so

to confer, respectively, by the carrier or carriers and by the employees thereto interested in the dispute."

See further to the same effect the following quotation from Section 2, Sixth:

"In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of such notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: * * *"

Disputes which are not adjusted by conferences as provided in the two sections above quoted may then find their way to the Adjustment Board. Throughout all of these statutory provisions there is no indication that the framers of the statute had any intention to provide a means for adjusting disputes among employees. The only type of disputes for which provision is made are those where a carrier or carriers adopt one position and an employee or employees a contrary position this is

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the only type of dispute which can be referred to the Adjustment Board. Section 3, First (i) of the Act reads as follows:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application

of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Summarizing all of the foregoing, therefore, the statute clearly intended to merge the individual interests of individual employees into the collective interest of the craft or class to which they belong. This collective interest can only be expressed through a representative selected for that purpose. Such a representative is empowered to make agreements obligating the individual and to represent him in the consideration of grievances and disputes. In either case the act of the representative will bind the individual, even when against the latter's will. Hence, we conclude that when an individual's rights are bound up in a collective dispute between his employer and the collective bargaining group of employees to which he belongs, the representative has full authority to submit such a dispute to the National Railroad Adjustment Board, if it cannot be otherwise adjusted, to conduct the case before the Board

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according to its best judgment, and to bind the individual by any decision which may be reached. The individual himself is no more a party to the case nor "involved",

therein than is a stockholder of the carrier corporation, and is therefore entitled to no notice of the pendency of the proceeding under the terms of the Railway Labor Act.

The above discussion has been devoted to a consideration of the legal necessity of notice to dissenting employees. In Monograph No. 17 attention is called to the fact that this question has been twice before the courts with varying results. (See Nord v. Griffin, 86 Fed. (2) 481, where notice was held to be necessary, and Estes v. Union Terminal Company, 89 Fed. (2) 768, where the majority of the court held that the plaintiff had received actual notice of the pendency of a case before the Adjustment Board, while Justice Hutcheson in a concurring opinion concluded that no notice was necessary to individual employees. The legal issue, therefore, is still unsettled and may with propriety be left for final decision to the courts.

There remains, however, a further question as to whether the Board, as a matter of policy, should by rule establish a practice of giving notice in such cases. It is our position that notice to individual employees is in some instances unnecessary and in others impossible. Where only a few employees are involved in a dispute, notice can be given, but in such cases, particularly where the carrier is fighting the battle of the dissenting employees, it is absolutely impossible that the case could proceed without actual notice to them. In other instances the number of employees who might be injuriously affected by a decision of the Board favoring em-

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ployees may number into the hundreds, and their exact

identity may not be determinable. Any effective notice to groups of this kind is wholly impossible.

Accordingly, we conclude that the Board is not required by law to give notice to employees who are represented by labor organizations (even though they disagree with the position taken by that organization), and further, that there is no requirement of policy rendering it desirable that such notice be afforded as a matter of rule.

Respectfully submitted,

Frank L. Mulholland,
Clarence M. Mulholland,
Willard H. McEwen,
Attorneys for Railway Labor Executives' Association.

Mulholland, Robie & McEwen,
1040 Nicholas Bldg., Toledo, Ohio.

Appendix C

General Order No. 13
creating Railway Board of Adjustment No. 1

UNITED STATES RAILROAD ADMINISTRATION
W. G. McAdoo, Director General

General Order No. 13

Washington, March 22, 1918.

Whereas practically all of the railroads now under control of the Director General have in existence at this time agreements with the Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railroad Trainmen, and Brotherhood of Locomotive Firemen and Enginemen which provide for basis of compensation and regulations of employment; and

Whereas in existing circumstances it is the patriotic duty of both officers and employees of the railroads under Federal control, during the present war, promptly and equitably to adjust any controversies which may arise, thereby eliminating misunderstandings which tend to lessen the efficiency of the service:

It is hereby ordered, That the basis arrived at in the annexed understanding between Messrs. A. H. Smith, C. H. Markham, and R. H. Aishton, regional directors, representing the railroads in the eastern, southern and western territories with the chief executive officers of the Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railroad Trainmen, and Brotherhood of Locomotive Firemen and Enginemen, be,

and the same is hereby, adopted and put into effect as of March 22, 1918.

W. G. McAdoo,
Director General of Railroads.

Memorandum of an Understanding Between Messrs. A. H. Smith, C. H. Markham, and R. H. Aishton, Regional Directors, Representing the Railroads in Their Respective Regions, and Mr. W. S. Stone, Grand Chief Engineer Brotherhood of Locomotive Engineers; Mr. A. B. Garretson, President Order of Railway Conductors; Mr. W. G. Lee, President Brotherhood of Railroad Trainmen; Mr. Timothy Shea, Acting President Brotherhood of Locomotive Firemen and Enginemen.

It is understood, That all controversies growing out of the interpretation or application of the provisions of the wage schedule or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government shall be disposed of in the following manner:

1. There shall be at once created a commission, to be known as Railway Board of Adjustment No. 1, to consist of eight members, four to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the four organizations of employees hereinbefore named and compensated by such organizations.

2. This Board of Adjusfment No. 1 shall meet in the city of Washington, within 10 days after the selection of its members, and elect a chairman and vice-chairman.

who shall be members of the board. The chairman or vice-chairman will preside at meetings of the board, and both will be required to vote upon the adoption of all decisions of the board.

3. The board shall meet regularly, at stated times each month, and continue in session until all matters before it are considered.

4. Unless otherwise mutually agreed, all meetings of the board shall be held in the city of Washington: Provided, That the board shall have authority to empower two or more of its members to conduct hearings and pass upon controversies, when properly submitted at any place designated by the board: Provided further, That such subdivision of the board will not be authorized to make final decision. All decisions shall be made and approved by the entire board, as herein provided.

5. Should a vacancy occur in the board for any cause, such vacancies shall be immediately filled by the same appointive authority which made the original selection.

6. All authority vested in the Commission of Eight, to adjust disputes arising out of the application of the Eight-Hour Law, is hereby transferred to the Railway Board of Adjustment No. 1, in the same manner as has heretofore been done by the Commission of Eight. All decisions of a general character heretofore made by the Commission of Eight are hereby confirmed, and shall apply to all railroads under governmental operation, unless exempted in said Eight-Hour Law. Decisions which have been rendered by the Commission of Eight, and which apply to individual railroads, shall remain in

effect until superseded by decisions of the Railway Board of Adjustment No. 1 made in accordance with this understanding.

7. The Board of Adjustment No. 1 shall render decisions on all matters in dispute as provided in the preamble hereof, and when properly submitted to the board.

8. The broad question of wages and hours will be considered by the Raliroad Wage Commission, but matters of controversies arising from interpretations of wage agreements, not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 1, when properly presented to it.

9. Wages and hours, when fixed by the Director General, shall be incorporated into existing agreements on the several railroads, and should differences arise between the management and the employees of any of the railroads as to such incorporation, such questions of difference shall be decided by the Railway Board of Adjustment No. 1, when properly presented, subject always to review by the Director General.

10. Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or some one officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief

executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall refer the matter, with all supporting papers, to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

11. No matter will be considered by the Railway Board of Adjustment No. 1 unless officially referred to it in the manner herein prescribed.

12. In hearings before the Railway Board of Adjustment No. 1, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the chief executive officer of the organization concerned.

13. All clerical and office expenses will be paid by the United States Railroad Administration. The railroad directly concerned and the organization involved in a hearing will, respectively, assume any expense incurred in presenting a case.

14. In each case an effort should be made to present a joint concrete statement of facts as to any controversies.

but the board is fully authorized to require information in addition to the concrete statement of facts, and may call upon the chief operating officer of the railroad or the chief executive officer of the organization concerned for additional evidence, either oral or written.

15. All decisions of the Railway Board of Adjustment No. 1 shall be approved by a majority vote of all members of the board.

16. After a matter has been considered by the board, and in the event a majority vote cannot be obtained, then any four members of the board may elect to refer the matter upon which no decision has been reached to the Director General of Railroads for a final decision.

17. The Railway Board of Adjustment No. 1 shall keep a complete and accurate record of all matters submitted for its consideration and of all decisions made by the board.

18. A report of all cases decided, including the decision, will be filed with the Director Division of Labor of the United States Railroad Administration, with the chief operating officer of the railroad affected, the several regional directors, and with the chief executive officers of the organizations concerned.

19. This understanding shall become effective upon its approval by the Director General of Railroads and shall remain in full force and effect during the period of the present war, and thereafter, unless a majority of the regional directors, on the one hand, as representing the railroads, or a majority of the chief executive officers of the organizations, on the other hand, as representing the

employees, shall desire to terminate the same, which can, in these circumstances, be done on 30 days' formal notice, or shall be terminated by the Director General himself, at his discretion, on 30 days' formal notice.

Signed and sealed this 22nd day of March, 1918.

A. H. Smith,
C. H. Markham,
R. H. Aishton,
Regional Directors for the Railroads under Government Control.

W. S. Stone,
Grand Chief Engineer Brotherhood of Locomotive Engineers.

A. B. Garretson,
President Order of Railway Conductors.

W. G. Lee,
President Brotherhood of Railroad Trainmen.

Timothy Shea,
Acting President Brotherhood of Locomotive Firemen and Enginemen.

Appendix D

Circular No. 3 issued by the Director, Division of Labor, Regarding Handling of Disputes Not Referable to Railway Boards of Adjustment Nos. 1, 2, and 3

UNITED STATES RAILROAD ADMINISTRATION

W. G. McAdoo, Director General Railroads

DIVISION OF LABOR

Washington, D. C.

CIRCULAR No. 3.

August 30, 1918.

As set forth in General Order No. 8, issued February 21, 1918, it is the desire of the Director General that harmonious relations be maintained between the officials and employees of all railroads under Federal control.

"All now serve the Government and the public interest only. I want the officers and employees to get the spirit of this new era. Supreme devotion to country and invincible determination to perform the imperative duties of the hour while the life of the Nation is imperiled by war must obliterate old enmities and make friends and comrades of us all. There must be cooperation, not antagonism; confidence, not suspicion; mutual helpfulness, not grudging performance; just consideration, not arbitrary disregard of each other's rights and feelings; a fine discipline based on mutual respect and sympathy; and an earnest desire to serve the great public faithfully and efficiently. This is the new spirit and

purpose that must pervade every part and branch of the national railroad service."

In the adjustment of differences of opinion, not involving rates or amounts of wages or hours, that arise in the relations between the officials and employees, which differences are to be expected, sincere effort should be made to reach a common understanding without the necessity of reference to the Director General, or to the Division of Labor. Where such controversies are not so adjusted, or where questions involving rates or amount of wages or hours are raised, the following methods will be adopted;

(a) Requests by employees for increases in wages, in addition to increases provided for in wage orders, will be filed only with the Board of Railroad Wages and Working Conditions, to which board has been assigned the duty of hearing and investigating such matters, as provided in Article VII of General Order No. 27.

(b) The method of securing interpretation of wage orders is prescribed by the Director General in Supplement No. 6 to General Order No. 27 issued this day, and the prescribed method should be followed in cases involving interpretations of wage orders.

(c) When employees are represented by Railway Boards of Adjustment, the procedure as to all controversies within the scope of their duties will be as directed in general orders creating such boards. The fact that certain employees are not represented by Railway Boards of Adjustment will in no manner deprive them of any of the benefits accruing from such boards. An

assistant to the Director of the Division of Labor has been appointed and a staff of representatives has been organized, for the especial purpose of rendering the same service to such employees as though represented by a Railway Board of Adjustment. Boards of adjustment have been created by understanding with the larger organization of employees for the convenience of handling such matters and to relieve the Director of the Division of Labor of adjusting same. It is not practicable to create Railway Boards of Adjustment, except for the larger organizations of employees.

(d) Requests for adjustments in wages by employees not represented by Railway Boards of Adjustment, which requests are based upon existing practices or adjustments reached through former arbitrations and settlements, will be presented to the proper officials of the railroads, and negotiations will be conducted in the usual manner up to the chief operating officer, or officer designated by him. Should no agreement be reached, and it appear to be necessary to take the matter further, a joint statement of facts (in duplicate) will be prepared by the representatives of the employees concerned and the proper officials of the railroad, and submitted to the Director of the Division of Labor of the United States Railroad Administration. Attached to such joint statement of facts will be such brief arguments by both parties to the controversy as is believed desirable by those concerned. When an adjustment is not then reached through correspondence, a representative will be assigned to investigate, and if by his assistance no agreement is

then reached, the matter in controversy will be referred again to the Director of the Division of Labor.

(e) Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees not represented by Railway Boards of Adjustment, will be handled in the usual manner by the individual, his representative, or by committees of employees, up to and including the chief operating officer of the railroad, or officer designated by him, when, if an agreement is not reached, the chairman of the committee of employees and the officer of the railroad will refer the matter to the Director of the Division of Labor, in the same manner as provided in paragraph (d) of this circular.

(f) When an employee, or class of employees, is not represented by committees, and negotiations can not be conducted in the usual manner, matters of complaint will be taken up with the proper officials of the railroad. When such employee or employees desire to appeal to the Director General, a complete statement of the cause of complaint will be filed by such employee or employees with the Director of the Division of Labor. When an adjustment is not reached through correspondents, a representative will be assigned to investigate; and if by his assistance no agreement is then reached, the matter in controversy will be referred again to the Director of the Division of Labor.

(g) General Order No. 8 suspended negotiations for revision of schedules or general changes in conditions affecting wages and hours pending decision of the matter

by the Director General, which was accomplished by General Order No. 27. No order has since been issued either prohibiting or directing that negotiations for revisions of working conditions be undertaken. This matter is left to follow the usual course, except that all requests for increases in wages, reduction of hours, or special rates of overtime will be taken up directly with the Board of Railroad Wages and Working Conditions. Where working conditions are not agreed upon by committees of employees and the officials of the railroads, a joint statement of the points at issue will be prepared and filed with the Director of the Division of Labor, attaching thereto such brief arguments as may be desired. When an adjustment is not then reached through correspondence a representative will be assigned to investigate, and if by his assistance no agreement is then reached, the matter in controversy will be referred again to the Director of the Division of Labor.

Nothing herein contained has reference to employees of railroads not under Federal control.

W. S. Carter,
Director Division of Labor.

Approved:
W. G. McAdoo,
Director General of Railroads.